

FINAL AWARD ALLOWING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 04-113765

Employee: Charles Goodson  
Employer: GB Logging LLC  
Gary Boushie (denied)  
Insurer: None  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge, as supplemented herein. The award and decision of Administrative Law Judge Lawrence Kasten, issued March 20, 2008, is attached and incorporated by this reference to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

Employee has not established the LLC veil should be pierced  
We affirm the administrative law judge's conclusion that the LLC veil of GB Logging, LLC, should not be pierced. As noted by the administrative law judge, one seeking to pierce the LLC veil must prove three elements:

- (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
- (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
- (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

*Collet v. American Nat'l Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. App. 1986) (citation omitted).

We write separately to address the third prong first because it is dispositive of the matter. Employee has failed to establish the third prong. Employee argues that Mr. Boushie proximately caused injury or unjust loss to Mr. Goodson by breaching his duty to maintain workers' compensation insurance. The injury with which we are concerned is employee's condition of ill-being due to the work injury. The proximate cause of employee's work injury was a tree falling on his head. Mr. Boushie's failure to purchase workers'

compensation insurance did not cause employee's condition of ill-being.

The Second Injury Fund is not entitled to a credit

The administrative law judge concluded that GB Logging, LLC, is not entitled to a credit against its liability of \$25,000 representing the amount paid to employee by the insurer of GB Enterprises, Inc. The administrative law judge relied on §287.270 RSMo, in reaching his conclusion. We affirm the administrative law judge's determination.

The Second Injury Fund argues that it is entitled to the credit. We disagree. Section 287.220.5 RSMo provides, in part:

If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer, or in the case of death of an employee in the employ of an uninsured employer, funds from the second injury fund may be withdrawn to cover fair, reasonable, and necessary expenses in the manner required in sections 287.240 and 287.241. In defense of claims arising under this subsection, the treasurer of the state of Missouri, as custodian of the second injury fund, shall have the same defenses to such claims as would the uninsured employer.

This above-quoted language "imposes liability on the SIF as the statutory guarantor of past and future medical expenses for employees of uninsured employers." *Otte v. Langley's Lawn Care, Inc.*, 66 S.W.3d 64, 73 (Mo. App. 2001). This statute is unique in that the Second Injury Fund must defend against claims under this subsection with only those defenses that would be available to the uninsured employer. This principle was articulated in *Otte* wherein the Second Injury Fund attempted to defend a claim by arguing that the Second Injury Fund statute of limitations found in section 287.430 RSMo, precluded the claim. The Court said "[s]ince the claim for compensation against employer was timely under section 287.430, the defense of the statute of limitations was not available to the employer, and thus not available to the SIF under the provisions of section 287.220.5. Under the SIF's interpretation, the SIF would have available to it a defense not available to employer, which would conflict with the plain language of section 287.220.5." *Otte* at 73.

Because employer is not entitled to a credit under §287.270, neither is the Second Injury Fund.

The Commission approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 29th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

## FINAL AWARD

Employee: Charles Goodson

Injury No. 04-113765

Dependents: N/A

Employer: GB Logging LLC  
Gary Boushie (denied)

Additional Party: Second Injury Fund

Insurer: None

Hearing Date: December 17, 2007

Checked by: LK/kh

## SUMMARY OF FINDINGS

- Are any benefits awarded herein? Yes.
- Was the injury or occupational disease compensable under Chapter 287? Yes.
- Was there an accident or incident of occupational disease under the Law? Yes.
- Date of accident or onset of occupational disease? August 11, 2004.
- State location where accident occurred or occupational disease contracted: Madison County, Missouri.
- Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
- Did employer receive proper notice? Yes.
- Did accident or occupational disease arise out of and in the course of the employment? Yes.
- Was claim for compensation filed within time required by law? Yes.
- Was employer insured by above insurer? Uninsured.
- Describe work employee was doing and how accident happened or occupational disease contracted: The employee was stuck by a falling tree.

- Did accident or occupational disease cause death? No.
- Parts of body injured by accident or occupational disease: Body as a whole referable to the neck and head; and left shoulder.
- Nature and extent of any permanent disability: 20% of the body as a whole referable to the head and neck (400 week level); and 7.5% of the left shoulder (232 week level).
- Compensation paid to date for temporary total disability: None.
- Value necessary medical aid paid to date by employer: None.
- Value necessary medical aid not furnished by employer: \$14,561.83
- Employee's average weekly wage: \$274.92
- Weekly compensation rate: \$183.28
- Method wages computation: See Rulings of Law.
- Amount of compensation payable:
  - \$14,561.83 in previously incurred medical bills.
  - \$ 5,681.68 in temporary total disability.
  - \$17,851.47 in permanent partial disability.

Total: \$38,094.98

- Second Injury Fund liability: \$14,561.83 in medical bills.
- Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ken Seufert.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On December 17, 2007, Charles Goodson, appeared in person and by his attorney, Ken Seufert, for a hearing for a final award. Gary Boushie and GB Logging LLC were represented at the hearing by attorney Lindell Dunivan. Also present was Gary Boushie. The Second Injury Fund was represented by Assistant Attorney Gregg Johnson. Included in the Claim was an alleged third employer, GB Enterprises Inc., which was insured by Missouri Employer's Mutual Insurance Company. Mr. Goodson settled his claim against GB Enterprises Inc. and Missouri Employer's Mutual Insurance Company for \$25,000.00 on June 21, 2007 with all issues listed in dispute. At the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

- Charles Goodson's claim was filed within the time allowed by law.
- The alleged employers have not paid any medical aid.

The alleged employers have not paid any temporary disability.

- Gary Boushie and GB Logging LLC did not have workers' compensation insurance on August 11, 2004.

## ISSUES

- Covered employer(s)
- Covered employee
- Accident
- Notice
- Average weekly wage and rate of compensation
- Medical causation
- Claim for previously incurred medical
- Claim for mileage
- Temporary total disability
- Permanent partial disability
- Liability of the Second Injury Fund for payment of medical expenses as a result of the alleged employers being uninsured
- Alleged credit for the \$25,000.00 compromise settlement between Charles Goodson and GB Enterprises Inc. /Missouri Employer's Mutual Insurance.
- Attorney's fees and costs under 287.560 RSMo.

## EXHIBITS

The following exhibits were offered and admitted into evidence:

### Claimant's Exhibits

- Work for Hire Agreement
- Certificate of organization of a limited liability company issued by the Secretary of the State for GB Logging LLC
- Response of Gary Boushie, as a member, organizer or manager of GB Logging LLC to subpoena duces tecum
- Response of Gary Boushie, individually, to subpoena duces tecum.
- Supplemental response of Gary Boushie, individually, to subpoena duces tecum.
- Records regarding average weekly wage.
- Medical Report of Dr. Berkin.
- Medical records
- Medical bills
- Medical records for prior injury.
- July 24, 2006 Deposition of Gary Boushie.
- Withdrawn prior to being offered
- Itemized statement for legal services rendered

### Alleged Employers' Exhibits

- April 25, 2005 deposition of Charles Goodson

Second Injury Fund Exhibits: None offered

**Witnesses:** Mike Betsch, for the claimant; Charles Goodson, claimant; Gary Boushie, for the alleged employers.

**Briefs:** The claimant filed his brief on the day of the hearing. The alleged employers filed their brief on December 28, 2007. The claimant filed a response to the alleged employers' brief on January 11, 2008. The Second Injury Fund filed its brief on January 17, 2008.

Judicial Notice of the contents of the division file in Injury Number 04-113765 including the compromise settlement between Charles Goodson and Missouri Employer's Mutual Insurance Company and GB Enterprises Inc.

**FINDINGS OF FACT FOR ISSUE 1 COVERED EMPLOYER(S) AND ISSUE 2 COVERED EMPLOYEE:**

Gary Boushie operates a sawmill through GB Enterprises Inc. which was incorporated in 1990. Gary Boushie is the major stock holder. He and his wife are the only members of the board of directors and the only officers. He is the President and his wife is the Secretary. GB Enterprises Inc.'s usual business is a sawmill operation. The sawmill cuts saw logs into lumbar and sells lumbar products such as railroad ties, pallet lumbar, and mulch. The sawmill does not own timber land and does not harvest timber. It buys saw logs from others to make the lumbar products. In August of 2004, it had more than four employees and had workers' compensation insurance. The sawmill is located on Highway E in Madison County on property owned by Mr. Boushie. The corporation rents the land from him.

Mr. Boushie had problems getting a steady flow of saw logs into the sawmill from other people. On August 9, 2002, he formed a Limited Liability Company called GB Logging LLC for harvesting and selling timber. Its usual business is the harvesting of timber. Mr. Boushie is the owner and sole member of GB Logging LLC. He is the registered agent and the organizer of the company. The main purpose of GB Logging was to create a steady flow of logs to GB Enterprises Inc. for the sawmill. The business operates out of the same office as GB Enterprises Inc. Mr. Boushie and GB Logging LLC did not own timber land. The company contracts to buy timber and then harvests it. The company had a contract with the National Forest Service to cut timber. The timber being cut was three to four miles from the sawmill.

GB Enterprises Inc. buys logs from GB Logging LLC and others. In 2004, GB Enterprises Inc. purchased saw logs from Jim Spain in the amount of \$194.40 and from GB Logging LLC in the amount of \$109,210.04. GB Logging LLC sells logs to G.B. Enterprises for the sawmill. GB Logging LLC sold some saw logs to New Page and Rustic Wood Products. The pulpwood timber was sold to Missouri Fiber and to Wesbanco.

With regard to the harvesting of timber, there are four different tasks. A timber cutter or feller cuts down the trees. The second position is a skidder operator. A skidder grabs the fallen trees and drags them to the "deck" where a buck up man is located. The buck up man cuts the trees into certain log lengths and the top of the tree is used for pulpwood. The fourth position is a forwarder operator. A forwarder has a grappling hook to pick up the logs that the buck up man has cut, and puts them onto the forwarder. The cut logs are taken to the sawmill in the forwarder or are loaded by the forwarder onto a truck to be taken to the sawmill or to the pulp wood mill.

Mr. Boushie is and has been the only manger for GB Logging LLC but does not get a salary. Mr. Boushie took care of the books, handled payroll, paid the bills, procured the timber, sold the logs, kept track of sales, and provided all the equipment. He dealt with the National Forest Service. Mr. Boushie agreed that he was an employee of GB Logging LLC. Mr. Boushie testified that Kevin Montgomery was an employee of GB Logging LLC. Taxes were withheld and a W-2 was issued. He was paid by hour with a bonus of \$100.00 if the crew got over 50,000 board feet during a week. Kevin Montgomery was the forwarder operator. Mr. Boushie testified that Ben Riggs was an employee of GB Logging LLC. He was a skidder operator. A W-2 was issued. Mr. Riggs left the company in May of 2004.

Mr. Boushie testified that he hired contractors to cut and remove timber, and that the buck up man and timber cutter were independent contractors and not employees of GB Logging LLC. Contract workers had to sign a work for hire agreement to work for G.B. Logging. They got paid by the 1000 board feet of timber cut for each crew. The scaling of logs was done at the sawmill. GB Logging LLC did not withhold or pay social security taxes, unemployment, Medicare, and Federal or States withholding taxes on the work for hire persons.

Included in Exhibit C, were the Work for Hire Agreements that were entered into in 2003 and 2004. Each contract contained a description of services which was either to cut timber or buck up logs and what the payment of services would be for each 1000 board feet. The agreement could be terminated by notice from either party. The agreement also stated that the person signing the agreement was an independent contractor and was not an employee of G.B. Logging. GB Logging LLC would not provide fringe benefits including health insurance, paid vacation or any other benefit. With respect to injuries, the provider of the services would be obligated to obtain appropriate insurance

coverage for his benefit.

During the time that Mr. Goodson performed work for GB Logging LLC, there were work for hire agreements in effect with the following 9 persons: Charles Goodson, Oland Brawley, Troy Silvy, Jason Evans, Mickey Duncan, Jerry Goodman, Bill Whited, Mike Betsch and Larry Inman. From a review of those agreements in Claimant's Exhibit C, all the buck up persons were to be paid at \$10.00 per 1,000 board feet and all the timber cutters were to be paid at \$14.00 per 1,000 board feet.

Claimant's Exhibit E contains vendor payments for the contract workers. During 2003 and 2004, there were 14 contract workers paid by GB Logging LLC. During the time period that Charles Goodson worked and was paid (June 30 through August 13, 2004), there were 7 other contract workers that were paid. Oland Brawley was paid from May 12, 2004 through July 16, 2004. Bill Whited was paid from August of 2003 through July 23, 2004. Danny Curtis was paid from July 11, 2003 through August 6, 2004. Troy Silvy was paid from June 10, 2004 through August 13, 2004. Mike Betsch was paid on August 13 and August 20, 2004. Larry Inman was first paid on August 13, 2004 and was paid through the end of September of 2004. Jerry Goodman was first paid on August 2, 2004 and was paid through the end of December of 2004.

Mr. Betsch signed a work for hire agreement which was contained in Employee Exhibit C. He was informed that he had to sign the contract in order to go to work. He did not get insurance as set forth in the contract and no one asked for proof of insurance. He was hired to buck up logs and was to be paid \$10.00 per 1,000 board feet. He was given that rate and accepted the contract.

Mr. Goodson worked for GB Enterprises Inc. at the sawmill for about a month as a lumbar stacker. Mr. Goodson previously worked as a logger. There was differing testimony concerning the circumstances surrounding Mr. Goodson quitting work at the sawmill and starting to work as a logger in the woods. There is no dispute that Mr. Goodson signed a Work For Hire Agreement (Claimant's Exhibit A) which was effective on June 30, 2004 to buck logs at \$10.00 per 1,000 board feet. Mr. Goodson testified that he was told that if he did not sign the Work For Hire Agreement, he could not work. He did not bid or set the terms or negotiate the contract. Mr. Goodson did not get the insurance coverage and no one at the company asked him for any proof of insurance. Mr. Boushie testified that they never required proof of insurance after the contract was entered into.

Both Mr. Boushie and Mr. Goodson's testimony was that the work for hire people were to provide their own equipment including chain saws, fuel and oil.

Mr. Betsch testified that G.B. Logging set his hours and he was told what job to do. The foreman told him that he was to work eight hours a day and told him when he started and when to quit, and that he was to take lunch when everybody else did.

Mr. Goodson testified that he was told at the office that Kevin Montgomery was the foreman. Kevin told him that he was the foreman and gave the orders. Mr. Montgomery told him what his hours were. They started work at 6:00 a.m., took lunch around noon, and quit work by 4:00 or 5:00 p.m. Kevin told him how to cut up the logs. At the hearing, Mr. Goodson testified that he was reprimanded on the job by Kevin Montgomery about cutting logs too short and if he continued he would be fired. In his April 25, 2005 deposition, Mr. Goodson, when asked whether he was reprimanded, testified not that he knew of. At the hearing, Mr. Goodson testified that it dawned on him on the day of the hearing about being reprimanded. Mr. Goodson testified that sometimes he worked overtime and on Saturday. Kevin told him that if he did not work overtime or on Saturday, he would be terminated and be replaced by someone else.

Mr. Boushie testified that Kevin Montgomery was only the foreman of himself and Mr. Riggs the other employee. He testified that Mr. Montgomery had no duties with respect to the members of the crew. Contract workers took breaks when they wanted to, and did not have to take lunch when Kevin did. Mr. Boushie testified that Kevin Montgomery did not tell the contract workers when and where to be or when or where to work. Mr. Boushie testified that loggers are very independent, would not pay any attention even if they were told what to do and when to do it, and rarely work past noon. Mr. Boushie testified that Kevin Montgomery was not a foreman over Charles Goodson. He remembered Kevin complaining about the contractors and Mr. Boushie suggested that he might try to

spur them on, but Kevin had no authority to get them to do anything.

Mr. Goodson testified that Gary Boushie told Oland Brawley that he was causing too much damage to the timber and if he continued he would have to pay for it. Mr. Boushie told the timber cutters not to cut anything that was not marked with a red dot. Mr. Boushie testified that he was responsible for damaged trees under the contract with the Forest Service. The Forest Service complained to him about the trees not being cut properly and the stumps being too high. Mr. Boushie then complained to the contract workers.

Mr. Goodson testified that Oland Brawley would cut trees down in the morning but would leave work at noon. He did not cut down enough trees for the buck up man to work through the rest of the afternoon. Kevin Montgomery and Oland Brawley got into a yelling match about running out of timber in the afternoon. Oland Brawley's contract was terminated and it was Mr. Goodson's understanding was that it was because he was not cutting as much timber as he should. Mr. Goodson testified that he was afraid to leave the work site because he was afraid of being terminated.

Mr. Boushie testified that he terminated Mr. Brawley's work for hire agreement because Oland was not cutting the trees properly and left the stumps too high. He did not terminate the agreement due to the lack of timber being cut. Mr. Boushie testified that as manager of GB Logging LLC, he hired and fired the employees and signed and terminated the agreements with the work for hire contractors. No one else had authority to do so. He terminated contracts due to the contract workers not showing up for five days or more and for not performing the job properly.

Mr. Goodson testified that when he started working for GB Logging, there were five people including him working on the site. Oland Brawley was the tree cutter. Ben was the skidder operator; Mr. Goodson was the buck up man. Kevin Montgomery was the forwarder operator. The fifth person was a truck driver who took the saw logs to the sawmill and the pulp wood to Scott City. Mr. Goodson testified that GB Logging had another logging crew. He saw the other crew when the skidder that Ben was operating broke down. Mr. Goodson went with Kevin Montgomery to where the other crew was to get a maintenance man to repair the skidder. The other crew had a timber cutter, a skidder operator, a buck up man, and a forwarder operator.

Mr. Goodson testified that after Oland Brawley was fired, Troy Silvy became the timber cutter. He did not cut enough trees down and was terminated on August 10, 2004. Kevin Montgomery asked Mr. Goodson if he would cut timber the next day and if he did well, he would write another contract as a timber cutter. Mr. Goodson cut timber the remainder of August 10, 2004. Mr. Goodson did not sign a contract before he was injured. On August 11, 2004, Mr. Goodson was cutting timber. The rest of his crew was a skidder operator; Mike Betsch the buck up man; and Kevin Montgomery the forwarder operator.

Mike Betsch's first day was August 11, 2004. He testified that including him there were four people working on his crew. Mr. Goodson was the tree cutter. There was a skidder operator. Mr. Betsch was the buck up man and there was a forwarder operator.

Mr. Boushie testified that in 2004, the usual work crew consisted of a timber cutter, a skidder operator, and a buck up man. Sometimes, a forwarder was used to take the saw logs or pulp to a truck to be loaded. Sometimes, a truck would haul them from the area and sometimes a forwarder was used to take them to where the truck would load them. GB Logging provided the skidder and the forwarder. In 2004, GB Logging owned two skidders and one forwarder. GB Enterprises Inc. provided the truck and truck driver,

Mr. Boushie testified that during the time Mr. Goodson was working at GB Logging, there were two logging crews operating. Each crew had a timber cutter, a skidder and a buck up man. Each crew may or may not have had a forwarder operator. Mr. Boushie testified that when Mr. Goodson was injured there were five or more people working for GB Logging LLC if the employees and contract workers were counted.

Mr. Boushie testified that if he thought he was required to have workers' compensation for the logging enterprise, he would have. One of the reasons that he created the work for hire form and hired people as contract workers was to avoid paying workers' compensation insurance.

## **RULINGS OF LAW FOR ISSUE 1 COVERED EMPLOYER(S) AND ISSUE 2 COVERED EMPLOYEE:**

Charles Goodson is alleging that he was a covered employee of GB Logging LLC and that GB Logging was a covered employer. Mr. Goodson is requesting that the Court pierce the limited liability veil and hold Gary Boushie individually and personally liable for the workers' compensation obligations of GB Logging LLC. GB Logging LLC is alleging that Charles Goodson and the other contract workers were independent contractors and are disputing that they were employees. It is also disputing that it is a covered employer operating under and subject to the provision of the Missouri Workers Compensation Act.

### **Covered Employee:**

Under Section 287.020.1 RSMo, the word "employee" is defined to include "every person in the service of any employer, as defined in this Chapter, under any contract of hire, express or implied, oral or written or under any appointment or election, including executive officers of corporations." In White v. Dallas & Mavis Forwarding Company, Inc., 857 S.W.2d 278 (Mo. App. 1993), the Court held that an independent contractor is defined as "one who, exercises an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer, except as to the result of his work."

To determine whether an employment relationship exists, Missouri courts first apply the "controllable services test." See Lynn v. Lloyd A. Lynn, Inc., 493 S.W.2d 363 (Mo. App. 1973). If the application of the controllable services test fails to clearly indicate that an employment relationship exists, Missouri courts then undertake a secondary consideration of the factors in what is commonly referred to as the "relative nature of the work test." See Ceradsky v. Mid-America Dairymen, Inc., 583 S.W.2d 193 (Mo. App. 1979).

The pivotal question in determining the existence of an employer/employee relationship is whether the employer had the right to control the means and manner of the service, as distinguished from controlling the ultimate results of the service. The relevant factors to be considered under the "controllable services test" are: actual exercise of control; the extent of control; the duration of employment; the method of payment of services; the furnishing of equipment by the employer; the relationship of the services to the regular business of the employer; the right to discharge; and the contract. See Seaton v. Cabool Lease, Inc., 7 S.W.2d 501 (Mo. App. 2000), quoting Dawson v. Home Interiors & Gifts, Inc., 890 S.W.2d 747, 748 (Mo.App.1995). The Courts have held that no particular factor is dispositive of the issue, but that each factor must be considered in making the determination of whether an employee-employer relationship exists. See Seaton at 505, citing Watkins v. By-State Development Agency, 924 S.W.2d 18, 21 (Mo.App.1996).

### **Application of the Controllable Services Test:**

In Mr. Goodson's case, the factors in favor of an employee-employer relationship are the duration of employment, the right to discharge, and the relationship of the services to the regular business of the employer. The factors against an employer-employee relationship are the method of payment of services, the lack of furnishing equipment to the worker by the employer, and the written contract. There was contradictory evidence concerning the factors of actual exercise of control and the extent of the control. Overall, I find that with regard to the "controllable services test," there was not enough evidence to clearly find that Charles Goodson was an employee.

Therefore the "relative nature of the work test," must be used to determine the employment status. That inquiry focuses on the relationship between the nature of the work and the operation of the business served. If the work activity is of a kind necessary in the operation of the business, so that if not done by the worker it would be done by a direct employee of the business, then the cost of all workers' compensation claims associated with that business should be allocated to that business by designating the worker as an employee of the business. See Cerdasky v. Mid Am. Dairymen, Inc., 583 S.W.2d 193 (Mo. App. 1979) and Watkins v. Bi-State Development Agency, 924 S.W.2d 18 (Mo. App. 1996)

The factors considered by the Missouri courts in applying the "relative nature test" include: the skill required of the

worker in rendering the service in question; whether, in rendering the services in question, the worker is engaged in an occupation or enterprise that is distinct and separate from that of the alleged employer; to what extent the workers' occupation or business may be expected to carry its own allocation of financial burden for an industrial injury; whether the worker's services are the regular part of the business of employer; whether the worker's services were rendered continuously or intermittent; and whether the duration of the worker's services is sufficiently long to constitute the hiring by the alleged employer of continuous services, as opposed to contracting by the employer for completion of a particular job.

### **Application of the Relative Nature of the Work Test:**

The Skill of the Worker: Mr. Goodson was one of 15 persons during 2003 and 2004 that had performed the same type of work for GB Logging LLC harvesting timber as either timber cutters or buck up men. Mr. Goodson had no special skills or training to differentiate him from the other workers. The more skilled a position, the more likely it is to be considered to be done by an independent contractor.

Separate Enterprise: The logging services rendered by Mr. Goodson and the other persons were clearly not an occupation that was distinct and separate from GB Logging LLC.

Financial Burden: The work of Charles Goodson and the other persons for GB Logging LLC was a regular part of the harvesting of timber. It was not an independent business which would be feasible to channel the costs of a work-connected injury.

Regular Part of Business: The regular business of GB Logging LLC was the harvesting and sale of timber. The harvesting of the timber were the services that were provided by Charles Goodson and the other persons performing work for GB Logging LLC. The nature of the work was such that if it had not been done by the "independent contractors", direct employees of GB Logging LLC would have had to do it in order for GB Logging LLC to continue to stay in the business of harvesting and selling of timber. I find that Charles Goodson and the other persons services were a regular part of the business of the employer.

Continuous or Intermittent Services: The harvesting of timber by Charles Goodson and others was a continuous service provided to GB Logging LLC since it was organized on August 9, 2002.

Duration of Workers Services: Mr. Goodson performed services for GB Logging LLC since June 30, 2002. I find that the duration of Mr. Goodson's services was long enough to constitute the hiring by GB Logging LLC as distinguished from the contracting for the completion of a particular job.

All of the facts lead to a conclusion that there was an employer-employee relationship. I find that when applying the "Relative Nature of the Work Test", the evidence overwhelmingly supports a finding that the harvesting of timber by the various persons including Charles Goodson was a regular and continuous part of the business of GB Logging LLC. I find that as a matter of law that on or about August 11, 2004, Charles Goodson and the other persons harvesting timber as timber cutters and buck up men were employees of GB Logging LLC.

### **Covered Employer:**

Under Section 287.030.1 RSMo, an employer must have five or more employees to be deemed an covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act.

There is no dispute that Gary Boushie and Kevin Montgomery were employees of GB Logging LLC throughout the time that Charles Goodson worked there. There is no dispute that Mr. Riggs was also an employee but he stopped working there just before Mr. Goodson started.

There is no dispute that G.B. Logging had two timber crews working during the time Mr. Goodson was working from June 30, 2004 through August 11, 2004. There is a dispute between the parties as to how many persons were on each crew. Mr. Goodson's testimony was that each crew had four men: a timber cutter, a skidder operator, a buck up man, and a forwarder operator. Mr. Boushie testified that each of the crew had a minimum of three men: a timber cutter, a skidder and a buck up man. He testified that in 2004, G.B. Logging only had one forwarder and so each crew may or may not have had a forwarder operator. Mr. Boushie agreed that when Mr. Goodson was injured there were five or more persons working

for GB Logging LLC if the employees and contract workers were both counted. It is clear from the evidence that the following people were employees on August 11, 2004: Mr. Boushie, Kevin Montgomery, Charles Goodson, Mike Betsch, and Jerry Goodman. Based on Mr. Boushie's testimony, GB Logging LLC would have had a minimum of seven employees (Mr. Boushie and 2 crews with 3 employees each).

Based on evidence, I find that on or about August 11, 2004, GB Logging LLC had five or more employees. I find that GB Logging LLC was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act. I further find that on or about August 11, 2004, Charles Goodson was an employee of GB Logging LLC, and was working under the provisions of the Workers' Compensation Act of Missouri.

### **Piercing the Limited Liability Company Veil of GB Logging LLC:**

Mr. Goodson is requesting that the Court pierce the limited liability veil and hold Gary Boushie individually and personally liable for the workers' compensation obligations of GB Logging LLC. Claimant's Exhibit B is the Certificate of Organization of GB Logging LLC organized under the Laws of the State Missouri on August 9, 2002. Mr. Boushie was the sole organizer, is the registered agent, and the manager. Under Section 347.057 RSMo, a person who is a member, manager, or both, of a limited liability company is not liable, solely by reason of being a member or manager, or both, for a debt, obligation or liability of the limited liability company.

In his brief, the claimant cited Mobius Management Systems, Inc. v. West Physician's Search L.L.C., 175 S.W.3d 186 (Mo. App. 2005). In Mobius, there was a real estate lease between Mobius and West LLC which was signed by David West, West LLC's management member. Mobius filed a Rent and Possession Suit. In July of 2003, a Consent Judgment of \$175,000.00 was entered against West LLC, which was signed by David West. Mobius was unsuccessful in collecting the Judgment. In September of 2004, Mobius filed a Motion to Pierce the Corporate Veil seeking to recover personally from David West. Mobius alleged that West LLC failed to maintain books or records; David West commingled personal funds with West LLC; West LLC was under capitalized; and West LLC failed to follow corporate formalities. The Motion to Pierce the Corporate Veil was dismissed by a Circuit Judge and was appealed.

The Court of Appeals held that the three elements required to pierce the corporate veil of a Limited Liability Company are:

- The Claimant must show control, not mere majority or stock control, but complete domination, not only of finances, but of policy and business practice with respect to the transaction, such that the entity had no separate mind, will or existence of its own. It must be the alter ego of the defendant.
- The Claimant must show a breach of duty-that this control was used by the company to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or to commit a dishonest and unjust act in contravention of the claimant's legal rights.
- The Claimant must show that the control and breach of duty proximately caused the injury or unjust loss.

The Court held that the first element was met because David West owned 80% of the company, often paid West LLC employees with his own personal funds, and ran the company on his own for a year prior to the Consent Judgment. The Court held that second element was met because West LLC did not maintain accounts receivable or accounts payable ledgers; David West did not keep track of the money coming into and out of the company very well; West LLC did not have a bank account for the year prior to the Consent Judgment; West LLC never had any cash and ran a deficit; and David West knew when he signed the Consent Judgment that West LLC was unable to pay it. With regard to the third element, the Court held that Mobius suffered an injury which was the unpaid \$175,000.00 Judgment and that the injury, the judgment, was proximately caused by West LLC conduct.

I find that there is insufficient evidence to pierce the Limited Liability Company veil of GB Logging LLC, and hold Gary Boushie individually and personally liable for the workers' compensation obligations of GB Logging LLC. Unlike the Mobius case, there was no evidence that Gary Boushie paid the employees with his own personal

funds, that GB Logging LLC failed to maintain books or records including accounts receivable or accounts payable ledgers, failed to keep a bank account, or failed to follow the formalities of a Limited Liability Company. In Mobius the Court noted that the injury suffered was an unpaid judgment, and that the unpaid judgment was proximally caused by West LLC's conduct. In this case, GB Logging LLC was denying that Charles Goodson was an employee and that it was a covered employer under the Workers' Compensation Act. There has not been a final judgment that the employee has been unable to collect.

Mr. Goodman's request to pierce the limited liability veil and hold Gary Boushie individually and personally liable for the workers' compensation obligations of GB Logging LLC is denied. I find that Charles Goodson was not an employee of Gary Boushie, individually, and that Gary Boushie, individually was not the employer of Charles Goodson. Mr. Goodson's claim against Gary Boushie individually is therefore denied.

### **FINDINGS OF FACT FOR ISSUES 3 THROUGH 13:**

Prior to working for G.B. Enterprises and G.B. Logging, the employee had performed factory work, construction work, worked in timber and in sawmills. Prior to August 11, 2004, he had no problems with his head and neck including headaches.

In December of 2003, while working at Specialty Brands, he had a low back injury that resulted in a strain. The medical records from Dr. Toney and Wayne Medical Center show that the treatment was for the mid to lower thoracic region and down the left side of his back into his left leg. In May of 2004, the employee went to Wayne Medical Center due to the low back injury at work in December of 2003. The pain was in his mid to low back that radiated to his legs. In June of 2004, the diagnosis was a lumbar strain. The employee settled his workers' compensation claim for 7.5% of the body as a whole referable to the back.

On August 11, 2004, Mr. Goodson was cutting timber. A tree that he was cutting fell and struck the employee. Mr. Betsch testified that they found the employee lying on the ground with his head split open and thought he was dead. August 11, 2004 was the only day that Mr. Betsch worked because it was unnerving what had happened to the employee. The employee testified that he was cutting down a tree and the next thing he knew he was in his own truck being taken to the hospital by Kevin Montgomery. Mr. Montgomery told him that a tree had fallen on him. The employee was bloody and was hurting really bad in the back, neck and head.

The employee was admitted to Madison Medical Center for a closed head injury. The employee was cutting down trees and a tree hit his head, which caused a laceration, severe bleeding and unconsciousness. The employee had twenty-two staples and six sutures placed in his right temporal extending into the top of his head on the occipital area. The employee had tenderness to his ribs on the right side throughout the mid thoracic and the mid axillary line, right shoulder pain; and tenderness to the right clavicle area. The right wrist metacarpal had tenderness, swelling, and pain. The employee had anemia probably due to the acute hemorrhage loss. X-rays of the right hand, and right clavicle were negative. The right shoulder joint showed mild degenerative changes of the shoulder and AC joints. The thoracic spine showed mild wedge shaped of T11 and T12 and mild degenerative changes from T9 to T12. The CT scan of the head showed extra cranial hematoma in the right frontal parietal occipital region. The CT scan of the cervical spine showed bilateral foraminal stenosis from C2-C6 secondary to osteophytes and a postural central osteophyte indenting upon the dura sac at C5. Due to the long duration of loss of consciousness and severe head injury, the employee was transferred to St. Francis Medical Center on August 12 to be under the care of Dr. Lee, a neurologist.

Dr. Lee diagnosed the employee with a closed head injury with right scalp laceration and laceration to the right hand. He ordered a neurosurgical consult with Dr. Ray. Dr. Ray ordered several diagnostic tests that were done on August 13. The MRI showed degenerative disc disease from C2-C6. There were mild disc bulges at C3-4 and C4-5; a slightly larger disc bulge at C5-6; and mild disc bulges C7-T1 and T2-T3. There were some mild foraminal narrowing at C3-4, C4-5 and C5-6 but the nerve roots did not appear to be under compression. At C7-T1 a left paracentral disc protrusion slightly indented the left interior lateral aspect of the thecal sac but did not cause cord compression or central stenosis. The CT of the head did not show any intracranial bleeds or fracture. The cervical CT scan showed a broad disc bulge at C4-5; central disc osteophytes and central column broad disc protrusion at C5-6; a

minimal disc bulge that slightly effaced the anterior thecal sac at C6-7; and a left paracentral disc protrusion at C7-T1 that did not cause cord compression or central stenosis. The employee denied any radicular symptoms into his upper extremities and had no complaints of weakness or numbness. Dr. Ray noted that nothing surgical was seen on the scans. It appeared that most of the neck pain was musculoskeletal in nature. His impression was status post closed head injury, concussion, neck pain without radicular symptoms, right scalp laceration and laceration of the right hand. A muscle relaxer and non steroidal medication was prescribed.

Dr. Lee discharged the patient on August 14, with a diagnosis of a closed head injury with laceration, a laceration to the right hand and mild anemia. The employee was discharged on K-flex, Flexeril, Accupril, Tricor and Darvocet. On August 24, Nurse Practitioner Medley at Annapolis Family Clinic removed the 22 staples and 6 sutures from the incision.

The employee continued to be seen by Dr. Lee in the fall of 2004 and in the winter of 2005. On March 17, 2005, Dr. Lee noted that since the injury the employee had neck and lower back pain and headaches. The employee was on muscle relaxers and pain medication. Dr. Lee switched the employee to Tylenol 3. Dr. Lee had the employee off work through March 17, 2005. On March 17, Dr. Lee stated it was undetermined when the employee would return to work. The employee testified that he was unable to work from the day of the accident until March 17, 2005.

Dr. Lee saw the employee on May 3, 2005 and prescribed trigger point injections. On May 11, 2005 the employee saw Dr. Walker at the Pain Clinic who noted a somewhat stiff neck, pain in his shoulder, left arm and spine. Dr. Walker noted that the MRI and CT scan showed a small herniated disc at C7-T1, a bulging disc and small osteophytes throughout the cervical spine. At that time the employee was still taking Tylenol 3 and Flexeril. The employee's neck still had a slight decrease in flexion and extension and lateral bending. The impression was spasm and cervical radiculopathy. Dr. Walker performed three trigger point injections. The employee did not keep his July 5, 2005 appointment with Dr. Lee.

Mr. Goodson incurred medical bills for his treatment due to the accident. He still owes and is obligated for \$14,561.83 in medical bills which are in Claimant's Exhibit I. Those bills are for Dr. Lee, a radiologist, Cape Laboratory, prescription medicine from Wal-Mart, a pain management bill from St. Francis, Madison Medical Center, Cape Radiology, and St. Francis Medical Center. Gary Boushie and G.B. Logging never offered to pay for any of the medical care or to pay the bills. The employee was not offered medical treatment. Mr. Boushie was aware of Mr. Goodson's injury and knew he was in the hospitals.

The employee was sent by his attorney to Dr. Berkin on November 20, 2006. The employee had pain and tenderness to his neck and upper back with tightness and muscle spasms. He had pain to his neck with lifting. He had pain and limited motion of the left shoulder and weakness to his left arm. He had frequent headaches over the occipital area. Dr. Berkin noted the prior injury to his lower back.

In the examination Dr. Berkin noted tenderness extending from the base of the neck into the paraspinal muscles of the upper back extending from T1 to T7. Muscle spasms were present over the base of the neck laterally from the mid-line into the paravertebral muscles bilaterally. The employee had loss of motion of his neck in the flexion, extension, right rotation, left rotation and right and left lateral flexion. The employee had tenderness over the left shoulder localized over the anterior glenohumeral and acromioclavicular joint and over the posterior surface over the upper trapezius. The employee had some loss of motion in abduction, flexion and extension. Dr. Berkin's diagnosed a closed head injury with scalp laceration, post traumatic concussion syndrome with recurring headaches, cervical strain, protrusion of the C5-6, C7-T1 and T2-3 discs, and left shoulder strain.

It was Dr. Berkin's opinion that the treatment rendered to the employee was reasonable and necessary to cure him of the effects of the injury. Dr. Berkin reviewed the medical bills for the treatment provided for the injury and felt that the charges were fair and reasonable.

It was Dr. Berkin's opinion the employee's August 11, 2004 accident when the employee was struck by a falling tree was the prevailing factor in causing the closed head injury with post concussion syndrome, cervical strain with disc protrusions at C5-6, C7-T1 and T2-3 and a strain to the left shoulder. It was Dr. Berkin's opinion that as a

result of the August 2004 accident and injury, that the employee sustained a 25% permanent partial disability of the body as whole at the level of the cervical spine for the closed head injury with post concussion syndrome and cervical strain associated with multiple cervical disc protrusions. It was Dr. Berkin's opinion that as a result of the August 2004 accident and injury that the employee sustained a 15% permanent partial disability of the left upper extremity at the level of the shoulder for the left shoulder strain.

The employee testified that his current symptoms include neck pain and soreness and constant headaches. His left shoulder is sore and stiff and he has trouble moving it. Due to the injury he is taking Flexeril, Darvocet and Tylenol 3 which is being prescribed by Big Springs Medical Center. On the day of the hearing, the employee had pain in his back around his shoulders and in his neck. The employee does not lift anything over five pounds. He cannot bend over and do any lifting. He has stopped doing heavy work including chainsaw or sawmill work because of his neck and shoulder hurting with any activity. He cannot work eight hours a day due to the pain. The employee can only perform light duty work such as painting.

### **RULINGS OF LAW FOR ISSUES 3 THROUGH 13:**

#### ***Issue 3. Accident***

The testimony of the employee and Mike Betsch; and the medical records clearly establish that the employee suffered a work related accident on August 11, 2004. I find that on August 11, 2004, the employee sustained an accident those arose out of and the course of his employment with GB Logging LLC.

#### ***Issue 4. Notice***

Section 287.420 RSMo requires an employee to give written notice of an accident to the employer within 30 days of the accident. This requirement is waived where the employer is not prejudiced by the failure to receive timely written notice if the employee establishes that his employer had actual notice of a potentially compensable injury. The burden of proving prejudice then shifts to the employer. See Willis v. Jewish Hospital, 854 S.W. 82 (Mo. App. 1993). Mr. Boushie testified that he was aware of the employee's injury and knew he was in the hospitals. I find that the employer had actual notice of a potentially compensable injury and the burden of proving prejudice shifts to the employer. The employer offered no evidence that it was prejudiced. I therefore find the employer was not prejudiced by the failure of the employee to give written notice of his accident. The employee has therefore complied with the notice requirements.

#### ***Issue 5. Average Weekly Wage and Rate of Compensation***

The employee started working at GB Logging LLC on Wednesday, June 30, 2004. His last day at work was Wednesday, August 11, 2004. The employee was paid by the 1,000 board feet of timber. Claimant's Exhibit F is the expense account payments from G.B. Logging to Charles Goodson from July 2 though August 13, 2004. During his employment he was paid a total of \$1,585.89 on the following dates:

Friday, July 2, 2004	\$129.60
Friday, July 9, 2004	\$95.78
Friday, July 16, 2004	\$342.37
Friday, July 23, 2004	\$246.67
Monday, August 2, 2004	\$209.98
Friday, August 6, 2004	\$300.65
Friday, August 13, 2004	\$260.84

Under Section 287.250.1(4) RSMo, if the wages were fixed by the output of the employee, the average week wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, in which the employee was actually employed by the employer. The absence of five regular or scheduled work days even if not in

the same week shall be considered an absence for a calendar week. If the employee started employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded.

The employee started employment on Wednesday, June, 30, 2004, so that calendar week shall be excluded. It appears that during the week ending July 9, 2004, the employee did not work a full week. However, there was no evidence regarding the number of days the employee missed during that week or any other week that he was employed. The employee was injured on Wednesday, August 11, 2004.

Section 287.250.4 RSMo, states that if the average weekly wage cannot fairly and justly be determined, the Division may determine the average weekly wage in such a manner and by such a method as in the opinion of the Division, based upon the exceptional facts presented, fairly determine such employee's average weekly wage. I find that this section is applicable in this unusual case.

I find that the wages paid on Friday, July 2, 2004 and on Friday, August 13, 2004 shall be excluded since the employee started employment in the middle of the former week and was injured in the middle of the latter week. It is clear that the week ending on July 9, 2004 in which the employee was paid \$95.78 was not a typical week when compared to the other weeks, and shall be excluded. I find that the employee's average weekly wage shall be based upon the gross wages paid for the following four weeks: July 10-16 (\$342.37), July 17-23 (\$246.67), July 24-30 which was paid on August 2 (\$209.98), and the week of July 31-August 6 (\$300.65). The employee's gross wages during those 4 weeks was \$1,099.67. The employee's average weekly wage was \$274.92 (\$1099.67 divided by 4). I find that his rate of compensation is \$183.28.

#### ***Issue 6. Medical Causation***

It was Dr. Berkin's credible opinion the employee's August 11, 2004 accident and injury when the employee was struck by a falling tree was the prevailing factor in causing the closed head injury with post concussion syndrome, cervical strain with disc protrusions at C5-6, C7-T1 and T2-3 and a strain to the left shoulder. Dr. Berkin's opinion on medical causation is corroborated by the employee's testimony and the medical records

Based upon a review of all the evidence, I find that the employee's work related accident on August 11, 2004 was the prevailing factor in causing the injuries to his head, neck, and left shoulder and resulting medical condition including the closed head injury with post concussion syndrome, cervical strain with disc protrusions at C5-6, C7-T1 and T2-3 and a strain to the left shoulder, and the need for the subsequent medical treatment. I further find that the injuries to his head, neck, and left shoulder and resulting medical condition including the closed head injury with post concussion syndrome, cervical strain with disc protrusions at C5-6, C7-T1 and T2-3 and a strain to the left shoulder, and the need for the subsequent medical treatment were medically causally related to the employee's August 11, 2004 work accident.

#### ***Issue 7. Claim for Previously Incurred Medical***

The employee is claiming previously incurred medical bills in the amount of \$14,561.83. The employer is disputing those medical bills with regard to the issue of authorization, reasonableness, necessity, and causal relationship.

With regard to authorization, Section 287.140 RSMo gives the employer the right to select the treating physician. The employer waives that right by failing or neglecting to provide necessary medical aid. See Banks v. Springfield Park Care Center, 981 S.W.2d 161 (Mo. App. 1998). In Wiedower v. ACF Industries, 657 S.W.2d 71 (Mo. App. 1983), medical bills were awarded to the employee when the employer had notice of the injury but chose to treat the injury as non-compensable and did not offer medical services.

The employer will be liable for medical expenses incurred by the employee when the employer has unsuccessfully denied compensability of the claim. Denial of compensability is tantamount to a denial of liability for medical treatment. An Award can be entered for medical expenses of a employee through the selection of his own

medical treatment. *Beatty v. Chandeysson Elec. Co.*, 190 S.W.2d 648 (Mo. App. 1945). I Mo. Workers' Compensation Law Section 7.2 (Mo. Bar 3rd ed. 2004)

Mr. Boushie was aware of the employee's injury and knew he was in the hospitals. The employer did not offer medical treatment. The employer denied the compensability of the case. Based upon the case law and a review of the evidence, I find that the employer waived its right to select the treating physician by denying the compensability of the case and by failing or neglecting to provide necessary medical aid. The alleged defense of authorization is not valid.

Mr. Goodson testified that with regard to the medical bills contained in Claimant's Exhibit I; those were incurred for treatment that he received due to the accident. He still owes and is obligated for \$14,561.83 in medical bills. Those bills are for Dr. Lee in the amount of \$430.00; the radiologist in the amount of \$774.00; Cape Laboratory in the amount of \$189.00; prescription medicine from Wal-Mart in the amount of \$119.94; a pain management bill from St. Francis in the amount of \$225.00; Madison Medical Center in the amount of \$5,278.00; Cape Radiology in the amount of \$653.00; and St. Francis Medical Center in the amount of \$6,892.89.

With regard to the issue of reasonableness and necessity, it was Dr. Berkin's credible opinion that the treatment rendered to the employee was reasonable and necessary to cure him of the effects of the injury. Dr. Berkin reviewed the medical bills for the treatment provided for the injury and stated that the charges were fair and reasonable.

Based upon a review of all the evidence, I find that the medical treatment was reasonable and necessary to cure the employee of the effects of the injury, and that the medical bills are reasonable. Based on my ruling on medical causation in Issue 6, I further find that these requested medical bills were medically causally related to the August 11, 2004 work accident and injury. Based upon a review of the bills, I find the employer is responsible for and is directed to pay the employee the sum of \$14,561.83 for the previously incurred medical bills in Claimant's Exhibit I.

#### ***Issue 8. Claim for Mileage***

Since there was no evidence on this issue, the claim for mileage is denied.

#### ***Issue 9. Temporary Total Disability***

The employee is claiming temporary disability benefits from the date of the accident August 11, 2004 through March 17, 2005. Temporary Total disability benefits are intended to cover healing periods and are payable until the employee is able to return to work or until the employee has reached the point where further progress is not expected. Brookman v Henry Transportation, 924 S.W.2d 286 (Mo.App.1996). The employee was under active medical care by Dr. Lee from the date of the accident up through March 17, 2005. Dr. Lee had the employee off work through March 17, 2005. The employee testified that he was unable to work from the day of the accident until March 17, 2005.

I find that from the date of the accident through March 17, 2005, the employee was not able to return to work, was under active medical treatment, and had not reached the point where further progress was not expected. I find that the employee is entitled to temporary total disability from August 12, 2004 through March 17, 2005. The employer-insurer is therefore ordered to pay the employee 31 weeks of compensation at the rate of \$183.28 per week for a total of \$5,681.68.

#### ***Issue 10. Permanent Partial Disability***

It was Dr. Berkin's opinion that as a result of the August 11, 2004 accident and injury, that the employee sustained a 25% permanent partial disability of the body as whole at the level of the cervical spine for the closed head injury with post concussion syndrome and cervical strain associated with multiple cervical disc protrusions. It was Dr. Berkin's opinion that as a result of the August 2004 accident and injury that the employee sustained a 15% permanent partial disability of the left upper extremity at the level of the shoulder for the left shoulder strain.

Based on a review of the evidence, I find that as a direct result of the accident, the employee has sustained a 20% permanent partial disability of the body as a whole at level of the cervical spine and a 7.5% permanent partial disability of left upper extremity of the left shoulder at the 232 level. The employer-insurer is therefore ordered to pay to the employee 97.4 weeks of compensation at the rate of \$183.28 per week for a total award of permanent partial disability of \$17,851.47.

***Issue 11. Liability of the Second Injury Fund for payment of medical expenses.***

Section 287.220.5 RSMo provides; “if an employer fails to insure or self-insure as required in Section 287.280, funds from the Second Injury Fund may be withdrawn to cover the fair, reasonable and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer.....”. This section also provides that, “the Attorney General of the State of Missouri shall bring suit in the Circuit Court of the county in which the accident occurred against any employer not covered by this chapter as required in Section 287.280.” Given this statute, in cases involving an uninsured employer who is otherwise to be held liable for the payment of medical expenses, the Second Injury Fund has been designated by the legislature to stand in the shoes of the employer for purposes of providing medical treatment.

Based on the evidence, the stipulation, and my ruling on covered employer in Issue 1, I find that GB Logging LLC was a covered employer and failed to obtain workers’ compensation insurance or to otherwise qualify as a self-insured employer. I find that the Second Injury Fund is liable for previously incurred medical expenses. The Second Injury Fund is therefore directed to pay the employee the sum of \$14, 561.83 for the medical expenses incurred as set forth in Issue 7. To the extent the Second Injury Fund pays the previously incurred medical expenses to the employee, it shall be entitled to seek reimbursement from the employer in accordance with Section 287.220 RSMo, and other relevant statutes.

***Issue 12. Whether GB Logging LLC is entitled to a credit for the \$25,000.00 compromise settlement between Charles Goodson and GB Enterprises Inc. /Missouri Employer’s Mutual Insurance.***

Mr. Boushie testified that he did not agree with GB Enterprises Inc.’s insurance company settling with Mr. Goodson. Mr. Boushie opposed the settlement without also releasing both him and GB Logging LLC. In its brief, G.B. Logging argued that it should be entitled to a \$25,000 credit on any amount awarded to Charles Goodson so he will not receive a windfall.

Although, G.B. Enterprises Inc. and its’ insurer Missouri Employer’s Mutual Insurance Company were disputing Charles Goodson’s claim including the compensability of the claim and that he was an covered employee of GB Enterprises Inc., it decided to settled its alleged liability on a disputed and compromised basis in lieu of a hearing.

Charles Goodson’s claim against GB Enterprises Inc. and Missouri Employer’s Mutual Insurance Company was settled by Compromise Settlement on June 21, 2007 for a lump sum of \$25,000.00. The disputes listed were accident, medical causation, past and future medical treatment, temporary total disability, permanent partial disability, compensability of claim and covered employee. The percent of disability and to what body part were listed as disputed. There was an addendum attached to the Compromise Settlement that was signed by the attorney for the employee and the attorney for GB Enterprises Inc. and its’ insurer Missouri Employer’s Mutual Insurance Company which stated that the Stipulation and Settlement applies and only resolves the claim of Charles Goodson against GB Enterprises Inc. and its’ insurer, Missouri Employer’s Mutual Insurance, as to the Claim against same for unpaid medical expenses, temporary total disability and permanent partial disability.

Section 287.270 RSMo, states that “No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer’s insurance for liability under this chapter, shall be considered in determining the compensation due hereunder; . . . “. (Emphasis added).

In Wilmeth v. TMI, Inc., 26 S.W. 3d 476 (Mo. App. 2000), the uninsured employer was not entitled to a credit under Section 287.270 RSMo, for an occupational-accident insurance policy that paid benefits since it was not a workers’ compensation policy. The Court of Appeals in Shaffer v. St. John’s Health Center, 943 S.W. 2d 803 (Mo.

App. 1997) held that the employer was not entitled to credit for medical payments made by a health insurance carrier where the health insurance was provided to the employee as part of her employment benefits since the medical bills were not paid by the employer or its' workers' compensation carrier.

In Homan v. American Can Company, 535 S.W. 2d 574 (Mo. App. 1976), the employee received payments from a disability policy carried by the employer. Since it was not a workers' compensation policy, the Court of Appeals held that the employer was not entitled to a credit. Section 287.270 RSMo requires benefits to come from the employer or its' insurer for Workers' Compensation liability. Payments from any other source are not credited. In Ellis v. Western Electric Company, 664 S.W. 2d 639 (Mo. App. 1984) the Court citing 287.270 RSMo, held that payments from any source other than the employer or the employer's insurer for Workers' Compensation liability are not to be credited on Workers' Compensation benefits.

GB Enterprises Inc. and GB Logging LLC are two separate legal entities. GB Enterprises Inc. was incorporated in 1990. GB Logging LLC was organized in 2002. The employer, GB Logging LLC has not paid any benefits and it did not have workers' compensation insurance. The \$25,000 paid to Mr. Goodson from GB Enterprises Inc. and its' insurance company, is a source other than the employer, GB Logging LLC, or its insurer for Workers' Compensation liability. Therefore under Section 287.270 RSMo, and the case law, that settlement shall not be a credit for the compensation due to Charles Goodson from his employer, GB Logging LLC, under the terms of this award.

Based on a review of the statute, case law, and the evidence, I find that GB Logging LLC is not entitled to a credit for the \$25,000 settlement and payment made by GB Enterprises Inc.'s insurance company, Missouri Employer's Mutual Insurance. GB Logging LLC's request for a credit is denied.

***Issue 13. Attorney's fees and costs under 287.560 RSMo.***

The employee is requesting attorney's fees and costs under Section 287.560 RSMo which states that if the Division determines that any proceedings have been brought, prosecuted or defended without reasonable grounds, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

GB Logging LLC's main defense in the case was that it was not a covered employer and that Charles Goodson was not a covered employee but was an independent contractor. Due to the factual and legal issues in the case, I find that the employer did not defend the case including the final hearing without reasonable ground. I find that the denial of the case by GB Logging LLC was not unreasonable and not egregious. The employee's request for attorney's fees and costs under Section 287.560 RSMo is denied.

**ATTORNEY'S FEE:**

Ken Seufert, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: \_\_\_\_\_

Made by:

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Lawrence Kasten  
*Administrative Law Judge*

A true copy: Attest:

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Mr. Jeff Buker  
*Division Director*  
*Division of Workers' Compensation*